Filed 11/30/16 P. v. Gray CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHN RILEY GRAY, Defendant and Appellant.	A145183 (Sonoma County Super. Ct. No. SCR626794)

Defendant John Riley Gray appeals from the trial court's denial of his petition for resentencing of his conviction for receiving a stolen vehicle pursuant to Penal Code section 1170.18, enacted as part of Proposition 47, an initiative passed by the voters in November 2014.[1] On appeal, defendant contends the broad sweeping language of Proposition 47 applies to receipt of any kind of stolen property, including vehicles, where the value is less than $950 and where the defendant has no disqualifying prior convictions. He further contends that equal protection principles require a violation of section 496d—buying or receiving a stolen vehicle—to be treated the same as violations of section 496—buying or receiving stolen property—and section 490.2, subdivision (a)—petty theft, which he claims includes theft of low-value vehicles.

We decline to address these contentions because we conclude defendant did not satisfy his burden of establishing the value of the stolen vehicle. We therefore affirm the trial court's order.

[1] All further undesignated statutory references are to the Penal Code.

I. BACKGROUND

In 2012, defendant was found in possession of a stolen 1992 Dodge truck.[2] In 2013, defendant pleaded no contest to one felony count of buying or receiving a stolen vehicle in violation of section 496d. Defendant also admitted a prior strike conviction for grand theft of a firearm. (§§ 487, subd. (d)(2); 1170.12.) The trial court sentenced defendant to a term of four years and eight months in state prison.

In 2015, defendant filed petition for resentencing, seeking to reduce his felony conviction for buying or receiving a stolen vehicle to a misdemeanor pursuant to section 1170.18. Defendant argued that his conviction for receiving a stolen vehicle under section 496d qualified for reduction because the intent of Proposition 47 was to ensure that all thefts of property valued at $950 or less be classified as misdemeanors. The petition contained no allegations or appended statements regarding the vehicle in question or its estimated value.

In opposition, the People argued that section 496d was not included in the specific language of Proposition 47 and, as such, convictions for buying or receiving stolen vehicles were not eligible for resentencing. The People further claimed that the differing treatment of theft offenses did not raise an equal protection problem because there was a rational basis for that distinction. Finally, the People argued that the vehicle in question was valued at more than $950 pursuant to the Kelly Blue Book.

At the hearing on the petition for resentencing, defense counsel stated she had no idea of the value of the stolen vehicle. The prosecutor advised the court that the Kelly Blue Book value for the 1992 Dodge truck was $1,250. She explained she believed the vehicle was in fair condition, stating "Kelly Blue Book says 18 percent, 50 percent if . . . in good condition. I [used] fair to be the most conservative. I think it was $1,250." The court then asked defense counsel if she would like to put the matter over to look at this valuation information. Defense counsel stated that further review was not required and asked the court to rule on whether Proposition 47 applied. Defense counsel added that

---

[2] The facts underlying the conviction are irrelevant to the instant appeal.

subject to that ruling she would object to "the summary that's currently presented being received as evidence without further foundation, and non-specific to the vehicle involved in this case . . . ."

The trial court declined to make a ruling on the applicability of Proposition 47, explaining, "I'm waiting for a higher court to make rulings on these issues. When we have a piece of property that's over [$]950, that's what I'm going on in this case. If this car is valued at the time of the theft at over $950, the petition is going to be denied. [¶] And so [the prosecutor] has the Kelly Blue Book up, if you would like to take a look at it." In response, defense counsel stated, "I'm not wanting to make my own investigation, I'm simply submitting an objection to the fashion in which this evidence has been submitted in this particular case."

The trial court denied the petition on the grounds that the value of the property was over $950.

II. DISCUSSION

Defendant contends the trial court erred by denying his petition because the offense of receiving a stolen motor vehicle worth $950 or less, in violation of section 496d, subdivision (a), is eligible for reclassification and resentencing under Proposition 47. He further contends that failure to include section 496d offenses within the purview of Proposition 47 violates equal protection.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Rivera, supra,* 233 Cal.App.4th at p. 1092.)

Under section 487, subdivision (d)(1), theft of a motor vehicle constitutes grand theft. Proposition 47 added section 490.2, subdivision (a), which provides, "Notwithstanding [s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor," with some exceptions not relevant here.

Similarly, Proposition 47 amended the law regarding the crime of receipt of stolen property. Section 490.2, subdivision (a) now provides, "Notwithstanding [s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor," subject to certain exceptions not relevant here.

These statutes are particularly important in the context of section 1170.18, where a defendant's ability to convert a prior felony into a misdemeanor depends on whether the defendant "would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense . . . ." (§ 1170.18, subd. (a).) Proposition 47 did not specifically amend section 496d or Vehicle Code section 10851 (unlawful driving or taking of a vehicle), both of which continue to be punishable as felonies.

Whether Proposition 47 governs a conviction under section 496d when the value of the motor vehicle does not exceed $950 is currently pending before the California Supreme Court. (See, e.g., *People v. Nichols* (2016) 244 Cal.App.4th 681, review granted Apr. 20, 2016, S233055; *People v. Garness* (2015) 241 Cal.App.4th 1370, review granted Jan. 27, 2016, S231031.) Additionally, many courts have struggled with the question whether section 490.2 renders vehicle thefts misdemeanors if the vehicle is valued at less than $950. (See, e.g., *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150, *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344; *People v. Haywood* (2015) 243 Cal.App.4th 515,

review granted March 9, 2016, S232250; and *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.)

We need not address this issue because even assuming receipt of a stolen vehicle falls within the ambit of section 1170.18, defendant failed to demonstrate his eligibility for relief because he failed to present any evidence the vehicle in question was valued at $950 or less.

As petitioner in the trial court, it was defendant's burden to offer evidence on the facts necessary to justify relief. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) In *Sherow*, the petitioner, who had been convicted of second degree burglary, sought to be resentenced pursuant to section 1170.18, subdivision (a), but provided no evidence in conjunction with his petition, and there was nothing in the record indicating the value of the property he stole. (*Sherow, supra,* 239 Cal.App.4th at p. 877.) In concluding the burden was on petitioner, the court reasoned, "As an ordinary proposition: ' "[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." ' " (*Id.* at p. 879.) It rejected petitioner's due process argument, holding, "We think it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based. [¶] Applying the burden to [petitioner] would not be unfair or unreasonable. He knows what kind of items he took from the stores . . . . At the time of trial it was not necessary for the prosecution to prove the value of the loss to prove second degree burglary. Thus there is apparently no record of value in the trial record. [¶] A proper petition could certainly contain at least [petitioner's] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination." (*Id.* at p. 880.)

Applying these principles here, defendant's contention that it was the People's burden to establish the value of the stolen vehicle is without merit.[3] Section 1170.18, subdivision (g), states, "If *the application* satisfies the criteria in subdivision (f), the court

---

[3] By the same token, defendant's challenge to the People's use of the Kelly Blue Book value to establish the value of the stolen vehicle similarly fails.

shall designate the felony offense or offenses as a misdemeanor." (Italics added.) Although section 1170.18 does not explicitly allocate the burden of proof, requiring that "the application" satisfy the appropriate criteria strongly suggests the burden is on the petitioner.

In the instant case, defendant's petition contained no evidence of the value of the vehicle stolen. All that can be discerned from the felony complaint is that it was alleged to be a 1992 Dodge truck, and was thus approximately 10 years old in early 2013, when defendant admitted to possessing it. To the extent this suggests a value, it does not suggest a value of $950 or less. Accordingly, defendant failed to demonstrate his eligibility for relief under section 1170.18. In the *Sherow* case, the court affirmed the denial of defendant's petition "without prejudice to subsequent consideration of a properly filed petition." (*Sherow, supra,* 239 Cal.App.4th at p. 881.) We will do the same.

III. DISPOSITION

The postjudgment order is affirmed without prejudice to subsequent consideration of a properly filed petition.

_____
REARDON, J.

We concur:

_____
RUVOLO, P. J.

_____
STREETER, J.